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No. 97-1684

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

MICHAEL A. LEBRON
Petitioner,

v.

THE NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK),
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Second Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the First Amendment requires that Amtrak permit the display of a concededly political ad on the billboard that dominates the entrance to Pennsylvania Station in New York City, when Amtrak's policy and practice has been to prohibit political advertising.

RULE 29.1 LISTING

The National Railroad Passenger Corporation has no parent companies or subsidiaries.

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The petitioner in this case seeks to compel the National Railroad Passenger Corporation ("Amtrak") to

permit the display of a concededly political advertisement—an ad attacking the political activities of the Coors family, owners of the Coors Brewing Company—on the massive "Spectacular" billboard that dominates the entrance to Pennsylvania Station in New York. Amtrak rejected petitioner's political advertisement pursuant to the corporation's longstanding policy of limiting the Spectacular to commercial advertising.

Applying this Court's "public forum" doctrine, the court of appeals held that Amtrak's refusal to accept political advertising on the Spectacular was reasonable and viewpoint-neutral, and that petitioner therefore had no First Amendment right to display his advertisement on the Spectacular. Pet. App. 4a. That decision does not warrant review because it does not conflict with any decision of this Court or any decision of another court of appeals. Rather, the decision was based on well-established principles of public forum law and a decision of this Court, *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), that is indistinguishable on the facts.

A. Background

1. *The Spectacular*

On the west side of the upper level of Penn Station, dominating the main entrance to Amtrak's waiting room and ticket area, is a curved, 103-foot long by 10-foot high illuminated billboard known as "the Spectacular."

Pet. App. 4a.[1] As anyone who has been in Penn Station can attest, it is virtually impossible not to notice the Spectacular as one enters the Amtrak terminal and descends on the escalators that directly face it. C.A.App. 1177. In the words of the district court, its presence is "inescapable." C.A.App. 139.

The Spectacular was constructed in 1967 by Transportation Displays, Incorporated ("TDI"), a privately-held advertising agency, pursuant to a contract with the Pennsylvania Railroad Company, which then owned Penn Station. The contract gave TDI the right to "construct and maintain, at [its] own cost and expense, an advertising Spectacular display for sale to advertisers." E. 188. TDI agreed to pay the railroad a percentage of the gross receipts derived from advertising displayed on the Spectacular, and it agreed further that no advertisement would be displayed without prior approval of the railroad. E. 190, 192.

Amtrak, which now owns Penn Station and exercises complete control over the area where the Spectacular is located, has continued essentially the same arrangement that the Pennsylvania Railroad Company had with TDI. The contract now in effect between Amtrak and TDI authorizes TDI to sell advertising space on the Spectacular and in other locations, and provides that TDI shall pay Amtrak a percentage of its net receipts. E. 3. It also expressly provides that "[a]ll advertising material, exhibit material, notices and advertisements and their manner of

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[1] Citations to Pet. App. are to pages of the Appendix to the Petition. Citations to C.A.App. and E. are to pages of the joint appendix and exhibit volumes in the court of appeals.

presentation and design, shall be subject to approval by Amtrak." E. 5.

Advertising on the Spectacular (which sells for nearly $20,000 per month) has been overseen at all relevant times by Amtrak's Real Estate and Operations Development Department. E. 2345. The Vice President for that Department, Anthony DeAngelo, applies Amtrak's advertising policies and makes the final decision whether to approve ads for the Spectacular. C.A.App. 106-08.

Political advertising has *always* been prohibited on the Spectacular. C.A.App. 107, 365-66, 813-15, 823-24, 844. In fact, the Pennsylvania Railroad Company adopted this policy in 1967 when the Spectacular was first built—before Amtrak even existed. C.A.App. 365-66, 813-15; E. 192. Amtrak continued the policy when it assumed control over the Spectacular in 1976 because, like the Pennsylvania Railroad, it recognized that partisan displays might offend or anger some of its customers. In the nearly three decades since its construction, no remotely political or other noncommercial advertisement has ever appeared on the Spectacular.[2] As Chief Judge Newman noted in dissent below, "Amtrak's billboard space in Pennsylvania Station . . . has not become a forum for ads of such pointed political content as Lebron's attack on the makers of Coors beer for promoting 'The Far Right's

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[2] The only ads that have appeared on the Spectacular are those promoting the DuPont Company, Resorts International in Atlantic City, the Broadway play "Sophisticated Ladies," Fujitsu computers, Nike athletic wear, and A&S Department Store. Pet. App. 7a.

political agenda.'" *Lebron v. National R.R. Passenger Corp.*, 12 F.3d 388, 394 (2d Cir. 1993).

2. *Amtrak's Rejection of Petitioner's "Advertorial"*

Petitioner's proposed "advertorial," as he calls it, is a photomontage of convivial Coors beer drinkers, juxtaposed with a scene in which Nicaraguan villagers are menaced by a flaming Coors beer can hurtling toward them like a missile. In addition to its powerful visual image, the advertorial contains considerable text, superimposed on an American flag, which is sharply critical of the Coors family's support of "the Far Right's political agenda." Pet. App. 5a.[3]

On November 30, 1992, petitioner signed a contract with TDI to display his work for two months on the Spectacular. Pet. App. 4a. Petitioner knew when he signed the TDI contract that Amtrak retained the right to reject his ad. Pet. App. 4a. And he anticipated that there might be objection to the display of his advertorial on the Spectacular because of its "unusual nature." As he conceded, "[i]t wasn't commercial in the way they are used to." C.A.App. 228. In fact, "because of the subject matter" of his work, petitioner deliberately avoided disclosing its content to TDI until December 2, 1992, two days after he signed the TDI contract. C.A. App. 201-03, 211.

On December 17, Amtrak's Vice President, Anthony DeAngelo, first learned of petitioner's

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[3] The full text of petitioner's advertorial is reprinted in the Appendix to this Brief in Opposition.

proposed ad. He immediately rejected it as political. C.A.App. 107-08. In a letter dated December 23, 1992, DeAngelo notified TDI of his decision, invoking Amtrak's longstanding "policy that it will not allow political advertising on the spectacular' advertising sign." Pet. App. 5a; C.A.App. 114.[4]

TDI offered petitioner any one of 500 alternative sites in New York City, all of which he rejected. Pet. App. 5a. As petitioner explained, he considers the Spectacular "an extraordinarily unique advertising location in New York City." Pet. App. 6a.

B. The Decisions Below

Petitioner commenced this action on December 30, 1992, seeking an injunction requiring Amtrak to display his advertorial. The district court conducted a trial entirely on documentary submissions—including deposition transcripts, exhibits, stipulations, and admissions derived from each party's "mark-up" of proposed findings of fact submitted by the opposition.

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[4] Petitioner contends that Amtrak's policy is "unwritten" and "undisseminated." Pet. 6. But when petitioner briefed the government action issue to this Court, he acknowledged that "[t]he advertising policy at issue here preceded DeAngelo's arrival at Amtrak . . . and is reflected in writing in Amtrak's leasing contracts." Brief for Petitioner (No. 93-1525), at 13. And although the policy may not have been widely disseminated to all Amtrak employees, what matters is that Anthony DeAngelo—the person who is responsible for overseeing third party advertising on the Spectacular and who rejected petitioner's ad—knew of and understood Amtrak's policy.

On February 5, 1993, the district court issued an opinion and order directing Amtrak to give petitioner immediate access to the Spectacular. The court held that Amtrak's decision to refuse to display petitioner's political advertorial on the Spectacular violated the First Amendment. Pet. App. 14c-22c. In reaching this conclusion, the district court ignored this Court's well-established public forum doctrine, which permits the government, when acting as proprietor rather than lawmaker, to control access to its property "based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 392-93 (1993)(quotation omitted). The district court failed to define the forum at issue, failed to determine whether the Spectacular (or whatever else the court thought the forum to be) was a public or nonpublic forum, and failed even to mention—let alone distinguish—*Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), a decision of this Court expressly upholding a municipal government's policy of prohibiting political advertising on city buses. The district court justified its holding that Amtrak must grant petitioner access to the Spectacular by applying *strict scrutiny*, in reliance on cases involving *public fora* open to all expressive activity. App. 14c-21c.

On October 30, 1995, in an opinion written by Judge Mahoney and joined by Judge Lumbard, the court of appeals reversed, holding that petitioner had no First Amendment right to display his advertorial on the

Spectacular. Pet. App. 4a.[5] Unlike the district court, the court of appeals applied public forum doctrine. Relying on this Court's decision in *Cornelius v. NAACP Legal Defense & Education Fund, Inc.*, 473 U.S. 788 (1985), the panel first determined that the relevant forum for purposes of analysis was the Spectacular, because petitioner sought access only to this unique property. Pet. App. 9a-10a. Next, the court of appeals looked to Amtrak's "policy and practice" to determine whether Amtrak "intended to designate" the Spectacular as a forum for political advertising. Pet. App. 10a (citing *Cornelius*, 473 U.S. at 802). The panel found that Amtrak's "practice is clear; it has never opened the Spectacular for anything except purely commercial advertising." Pet. App. 10a. The court concluded that "[i]n light of Amtrak's undisputed practice . . . the Spectacular is not a public forum." Pet. App. 11a.

Having determined that Amtrak had not intentionally designated the Spectacular an open forum for political speech, the panel turned to the question whether Amtrak's decision met the requisites established by this Court for regulating access to a non-public forum. Relying on this Court's decision in *Lehman v. City of Shaker Heights, supra*, which upheld a policy virtually identical to Amtrak's, the panel found

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[5] The court of appeals initially held, on December 27, 1993, that Amtrak was not a governmental actor for constitutional purposes. 12 F.3d 388 (2d Cir. 1993). This Court reversed that decision, holding that Amtrak is bound by the First Amendment. 513 U.S. 374 (1995). The Court remanded the case for a determination whether Amtrak's refusal to display petitioner's advertorial violated the First Amendment—a question upon which this Court "express[ed] no opinion." *Id.* at 400.

Amtrak's policy to be both reasonable and viewpoint-neutral. Pet. App. 11a-16a. Accordingly, the court of appeals reversed the judgment and remanded the case with the instruction that the district court dismiss petitioner's complaint, leaving petitioner "free to pursue his state law claim in state court." Pet. App. 18a.

On December 29, 1995, the court of appeals amended its opinion in two respects. First, the panel corrected a factual error in the opinion. The court had written that Amtrak's prohibition against political advertising "was limited in scope to the Spectacular." Pet. App. 16a. Although Amtrak applies the policy differently to the Spectacular (conducting prior review and approval of all proposed advertisements), Amtrak prohibits political advertising on all of its property. C.A.App. 349-52. The court of appeals amended its opinion to reflect this fact. Pet. App. 3b. Second, the panel amended its disposition of petitioner's contract claim. Instead of leaving that claim for a state court to resolve, the panel instructed the district court on remand to rule on petitioner's contract claim.

Petitioner immediately filed a petition for a writ of certiorari, which this Court denied. 116 S. Ct. 1675 (1996).

On remand, the district court dismissed petitioner's contract claim. 981 F. Supp. 279 (S.D.N.Y. 1997). Petitioner appealed, but he raised only the constitutional issue that the court of appeals had already decided against him in 1995. The court of appeals affirmed based on the parties' stipulation that the prior court of appeals ruling was law of the case. Pet. App. 4d.

Petitioner now seeks for the second time to have this Court review the court of appeals' 1995 ruling.

REASONS FOR DENYING THE PETITION

The decision of the court of appeals involved a straightforward application of well-established First Amendment principles. It does not conflict with any decision of any other court. In fact, it does not present any significant legal issue at all, only petitioner's disagreement with how the court of appeals applied settled law to the facts of this case.

I. THE COURT OF APPEALS CORRECTLY APPLIED THIS COURT'S PUBLIC FORUM DECISIONS

The court of appeals applied legal principles that have been established by more than a half dozen decisions of this Court—one of which, *Lehman v. City of Shaker Heights, supra*, is directly on point.

A. This Court's public forum doctrine is clear and well-defined

It is "well settled" that even "the government need not permit all forms of speech on property that it owns and controls." *International Society For Krishna Consciousness, Inc. ("ISKCON") v. Lee*, 505 U.S. 672, 678 (1992). "With respect to public property that is not a designated public forum open for indiscriminate public use for communicative purposes," this Court has held that "'[c]ontrol over access . . . can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.'"

Lamb's Chapel, 508 U.S. at 392-93 (quoting *Cornelius*, 473 U.S. at 806).

"Not every instrumentality used for communication . . . is a . . . public forum by designation." *Cornelius*, 473 U.S. at 803. And the mere fact "[t]hat [expressive] activity occurs in the context of the forum created does not imply that the forum thereby becomes a public forum for First Amendment purposes." *Id.* at 805. "The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Id.* at 802; *see ISKCON*, 505 U.S. at 680; *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 47 (1983).

The government may open a forum generally for expressive activity, or it may open a forum only "for a limited purpose such as use by certain groups . . . or for the discussion of certain subjects." *Id.* at 46 n.7 (citations omitted). When the government creates a limited public forum, the "right of access . . . extend[s] only to other entities of similar character." *Id.* at 48. Those seeking to engage in speech not previously permitted in the forum may be excluded, so long as such distinctions are "reasonable" and "not an effort to suppress the speaker's activity due to disagreement with the speaker's view." *ISKCON,* 505 U.S. at 679; *see Lamb's Chapel*, 508 U.S. at 392-93, *Cornelius*, 473 U.S. at 806; *Perry*, 460 U.S. at 46.

B. This Court has applied the public forum doctrine to uphold a policy that is indistinguishable from the policy asserted by Amtrak

Application of this well-established framework makes this case an easy one. Because Amtrak has not heretofore opened the Spectacular for political advertising, it need not open the Spectacular to petitioner for that purpose.

This Court's decision in *Lehman* is on point. In that case, the City of Shaker Heights prohibited all political advertisements on city-owned buses, while permitting commercial and service-oriented advertising. This Court upheld that policy, emphasizing the commercial nature of the city's enterprise:

> [T]he city is engaged in commerce. . . . The car card space, although incidental to the provision of public transportation, is a part of the commercial venture. In much the same way that a newspaper or periodical, or even a radio or television station, need not accept every proffer of advertising from the general public, a city transit system has discretion to develop and make reasonable choices concerning the type of advertising that may be displayed in its vehicles.

418 U.S. at 303 (plurality opinion). The plurality reasoned that in such circumstances, a governmental limitation on access to property it controls is valid so long as the policy is not "arbitrary, capricious, or invidious." *Id.* Under that standard, the city's prohibition against political advertisements was permissible. Absent the policy, the plurality reasoned,

> [u]sers [of the buses] would be subjected to the blare of political propaganda. There could be lurking doubts about favoritism, and sticky administrative problems might arise in parceling out limited space to eager politicians. In these circumstances, the managerial decision to limit car card space to innocuous and less controversial commercial and service oriented advertising does not rise to the dignity of a First Amendment violation. Were we to hold to the contrary, display cases in public hospitals, libraries, office buildings, military compounds, and other public facilities immediately would become Hyde Parks open to every would-be pamphleteer and politician. This the Constitution does not require.

Id. at 304. Precisely the same reasoning is applicable here. As the court of appeals explained, citing *Lehman*, "Amtrak's decision, as proprietor, to decline to enter the political arena, even indirectly, by displaying political advertisements is certainly reasonable." Pet. App. 14a.[6]

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[6] Petitioner contends that "*Lehman* rests on a captive audience rationale not applicable here." Pet. 23 n.23. This Court has declined to so limit its decision in *Lehman*. *See ISKCON*, 505 U.S. at 678; *United States v. Kokinda*, 497 U.S. 720, 725-26 (1990), *Cornelius*, 473 U.S. at 801-803-04, 806, 808-09; *Perry*, 460 U.S. at 49 n.9. In any event, the Amtrak riders who are forced to confront the 103 foot-long Spectacular as they descend the escalator at the entrance to Penn Station are no less "captive" than the audience that viewed the ads inside and outside the transit cars in *Lehman*.

II. THE COURT OF APPEALS DECISION DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT OR THOSE OF OTHER CIRCUITS

Petitioner suggests that there are conflicts between the decision of the court of appeals and the decisions of this Court and other circuits. But there are no conflicts—only petitioner's disagreement with how the court of appeals saw the facts. And the factual issues that petitioner raises are not worthy of this Court's attention.

A. There is no conflict over how to assess the nature of the forum

Petitioner says that the court of appeals accepted Amtrak's *post hoc* assertion of policy over evidence of contrary past practice in determining that Amtrak had not opened the Spectacular to political advertising, and that this approach conflicts with other courts' insistence on examining past practice. But the supposed conflict is nonexistent. The court of appeals did not reject the relevance of past practice. To the contrary, its ruling rested explicitly on evidence of past practice. The court noted that Amtrak's "practice is clear; it has never opened the Spectacular for anything except purely commercial advertising." Pet. App. 10a. *See also* Pet. App. 11a ("In light of Amtrak's undisputed practice with respect to the Spectacular, . . . we conclude that the Spectacular is not a public forum . . . . ").

The court of appeals decision does not conflict with the decisions of other courts that have insisted on an examination of the government's actual practice with regard to various speakers. In fact, the court of appeals

cited, quoted and explicitly relied upon those decisions. *See* Pet. App. 10a (quoting *Air Line Pilots Association v. Department of Aviation*, 45 F.3d 1144, 1154 (7th Cir. 1995)("a court must examine the actual policy—as gleaned from the consistent practice with regard to various speakers—to determine whether a state intended to create a designated public forum") and citing *AIDS Action Committee v. Massachusetts Bay Transportation Authority*, 42 F.3d 1, 10-12 (1st Cir. 1994)).[7]

Petitioner's real argument is not that the court of appeals disregarded Amtrak's past practices, but that on the specific facts of this case the court should have viewed those practices differently. But that is not an argument that reflects any conflict among the circuits or that warrants this Court's attention for any other reason. And it is not an argument that has merit in any event.

Petitioner argues that the court of appeals should have recognized that Amtrak allowed political advertising *elsewhere* in Penn Station. But there are several problems with that argument:

First, the relevant forum is not Penn Station as a whole, but the Spectacular, which is the only forum to which petitioner sought access. In the courts below, petitioner argued that Penn Station is the relevant forum.

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[7] The other cases cited by petitioner—*Grace Bible Fellowship, Inc. v. Maine School Admin. Dt. #5*, 941 F.2d 45, 47 (1st Cir. 1991), and *Stewart v. District of Columbia Armory Bd.*, 863 F.2d 1013 (D.C. Cir. 1988), for example—merely reaffirm the point, about which there is no disagreement, that objective evidence of past practice can constitute evidence of intent to create a public forum or not.

In his Petition, however, he no longer explicitly presses that point, for good reason.

In a long line of unvarying authority, this Court has made plain that the forum is defined by "the access sought by the speaker." *Cornelius*, 473 U.S. at 801. "When speakers seek general access to public property, the forum encompasses that property. In cases in which limited access is sought, [this Court's] cases have taken a more tailored approach to ascertaining the perimeters of a forum within the confines of the government property." *Id.* (citation omitted).[8]

Petitioner did not seek general access to Amtrak property, to Penn Station, or even to the advertising spaces located within Penn Station. Petitioner sought access only to the Spectacular because, in his words, that forum provides "an extraordinarily unique

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[8] For example, in *Lehman v. City of Shaker Heights*, where plaintiffs sought to compel the city to permit political advertising on city-owned buses, "the Court treated the advertising spaces on the buses as the forum." *Cornelius*, 473 U.S. at 801; *see Lehman*, 418 U.S. at 303. Similarly, in *Perry Education Association v. Perry Local Educators' Association*, where the plaintiffs sought access to a school's internal mail system and teachers' mailboxes, the Court defined the forum as those internal mail facilities and not the school generally. 460 U.S. at 46. In *Cornelius v. NAACP Legal Defense & Education Fund*, where legal defense and political advisory organizations sought to be included in the Combined Federal Campaign ("CFC"), an annual charitable fundraising drive conducted in the federal workplace, the Court defined the forum as the CFC, not the federal workplace. 473 U.S. at 800-01. And in *United States v. Kokinda*, where the plaintiffs sought to "solicit alms and contributions" on a postal sidewalk, the plurality focused on whether the sidewalk, and not the entire post office, was a public or nonpublic forum. 497 U.S. at 727-37.

advertising location." Pet. App. 6a. Petitioner maintains, and Amtrak agrees, that due to its size, location, and prominence, there is no other advertising space in Penn Station that commands the same attention or offers a comparable vehicle to reach Amtrak passengers. Pet. App. 5a-6a. Because the Spectacular is a unique forum, and because petitioner seeks access to it alone, the court of appeals properly framed the issue in this case to be whether Amtrak has intentionally designated the Spectacular as a forum for political advertising.

Second, although Amtrak prohibits political advertising anywhere on its property, the application of that policy to the Spectacular differs in one critical respect: due to the Spectacular's size, location and prominence—and because there is no equivalent forum in Penn Station—Amtrak subjects only those advertisements slated to appear on the Spectacular to prior review and approval. C.A.App. 366. Amtrak's policy of prior approval on the Spectacular ensures that political ads will not appear in that forum through inadvertence, and establishes beyond doubt its intent to "exercise control over the subject matter of the displays." *Cornelius*, 473 U.S. at 804 (discussing *Lehman*).

Petitioner contends that the court of appeals' focus on the Spectacular alone, rather than all advertising spaces in Penn Station, conflicts with the decision of the Seventh Circuit in *Air Line Pilots Ass'n v. Department of Aviation*, 45 F.3d 1144 (7th Cir. 1995). Before the Second Circuit, however, petitioner affirmatively recognized that the Seventh Circuit's decision in *Air Line Pilots* "supports Amtrak's argument that the

Spectacular is the relevant forum [because] the court found that the forum is defined in terms of the access sought by the speaker." Supplemental Letter Brief (5/5/95) (quotation omitted). That concession was correct. Applying *Cornelius*, the Seventh Circuit held that the district court erred in defining the relevant forum as O'Hare airport, rather than the advertising display cases to which the plaintiff sought access. 45 F.3d at 1151-52. Petitioner notes that the court did not limit itself to analysis of a single diorama or concourse. But that is because no one had suggested that one diorama was different from another, or that the airport applied its policy differently from one diorama to another. In short, no one argued to the court that it should limit its analysis to a single diorama. Here, by contrast, petitioner sought access to a very specific space—the only advertising space of its kind, and the only space for which Amtrak exercised a right of prior review and approval.

Third, even if Amtrak's practices elsewhere in Penn Station were relevant, they are not as they have been characterized by petitioner. It is simply not true that Amtrak "repeatedly displayed noncommercial, political advertisements in Penn Station." Pet. 14. There were, as the court of appeals noted, a "handful of assertedly borderline" ads that had appeared elsewhere in Penn Station, Pet. App. 18a—ads that the district court found were "not 'commercial,' and some of which are *arguably political*," Pet. App. 20c (emphasis added). But a few "arguably political" ads elsewhere in Penn Station hardly establish any practice contrary to

Amtrak's stated policy of disallowing political ads on the Spectacular.[9]

B. There is no conflict over whether a policy against political advertising amounts to viewpoint discrimination

It is well settled that even in a nonpublic forum the government cannot engage in discrimination on the basis of viewpoint. But it is equally well settled that a policy against all political advertising does not constitute viewpoint discrimination. Under such a policy, it is the political subject that is off limits, not any particular view on the subject. That is why this Court found no impermissible viewpoint discrimination in *Lehman*, and that is why there is no impermissible viewpoint discrimination in this case.

Petitioner suggests, however, that *Lehman* has been overtaken by this Court's decisions in *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S.

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[9] The record discloses nothing whatsoever about the content of three of the ads mentioned by the district court—ads placed by the New York Departments of Commerce and the Environment and the Foundation for Muscular Dystrophy. The fourth ad—a paid ad for Plain Truth magazine—promotes a product, the magazine. The placement of that ad in Penn Station is consistent with the acceptance of advertisements for publications without regard to the publication's content. E. 261, E. 347. Both the panel majority and the dissent found that these "assertedly borderline cases" were of a different kind than petitioner's advertorial. Pet. App. 18a. As Chief Judge Newman explained in dissent from the first court of appeals decision, "Amtrak's billboard space in Pennsylvania Station, even if used in the past for ads of a public service nature, has not become a forum for ads of such pointed political content as Lebron's . . . ." 12 F.3d at 394.

384 (1993), and *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995). But those decisions merely confirm that the government cannot "'den[y] access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.'" *Lamb's Chapel*, 508 U.S. at 394 (quoting *Cornelius*, 473 U.S. at 806). Thus, in *Lamb's Chapel*, the Court held that a public school district engaged in impermissible viewpoint discrimination by opening a forum "to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint." *Id.* at 393. And in *Rosenberger*, the Court held that the University of Virginia had engaged in viewpoint discrimination by denying funding to a student newspaper solely because of the paper's religious views. As in *Lamb's Chapel*, what triggered the decision was " [t]he prohibited perspective, not the general subject matter." 515 U.S. at 831.

The decision below does not conflict with *Lamb's Chapel* and *Rosenberger*. Amtrak did not prohibit a particular view or perspective about the Nicaraguan Civil War, the political agenda of the Coors family, or the broader subject that petitioner claims to have addressed in his advertorial—the "influence of a powerful, urban, materialistic and individualistic culture on rural, community based, family-oriented and religious cultures." Pet. App. 4a-5a. Those are not "subject[s] otherwise permissible" for discussion on the Spectacular. *Lamb's Chapel*, 508 U.S. at 394. Amtrak has never opened the Spectacular (or any other advertising space in Penn Station) for speakers to address such subjects—regardless of whether they

espouse liberal or conservative, religious or secular, or any other views.

For the same reason, the decision below does not conflict with the decisions of the various courts of appeals quoting or applying the lessons of *Lamb's Chapel* and *Rosenberger*. In *Air Line Pilots Association*, 45 F.3d at 1159, the Seventh Circuit in dictum merely quoted *Lamb's Chapel's* language inviting analysis of whether the proposed speech dealt with a subject that was "otherwise permissible" in the forum. In *Church on the Rock v. City of Albuquerque*, 84 F.3d 1273 (10th Cir. 1996), the court found viewpoint discrimination in a policy that permitted discussion of religion, including Christianity, but prohibited advocating the adoption of the Christian faith. The evil of such a policy, the court explained, was that the decision to bar the speech at issue was "'[t]he prohibited perspective, not the general subject matter.'" *Id.* at 1279 (quoting *Rosenberger*, 515 U.S. at 831). And in *AIDS Action Comm. v. Massachusetts Bay Transp. Auth.*, 42 F.3d 1, 7 (1st Cir. 1994), the court found "the appearance of viewpoint discrimination" under a very specific set of facts: after allowing a sexually explicit ad for a movie and sexually explicit ads promoting the use of condoms, and after receiving public letters (many described by the court as "homophobic") protesting the condom ads, the city refused a subsequent ad promoting condoms on the stated ground that it was sexually explicit. The appearance was that the city was not really opposed to sexually explicit material, but to the particular message conveyed by the ad promoting condom use.

There is no basis in this case for a belief that Amtrak was discriminating against petitioner's particular viewpoint or perspective, because it had never displayed any ad that was remotely like his. As even the dissent below acknowledged: "Amtrak's billboard space in Pennsylvania Station, even if used in the past for ads of a public service nature, has not become a forum for ads of such pointed political content" as petitioner's advertorial. 12 F.3d at 394.

Petitioner attempts to force this case into the *Lamb's Chapel* and *Rosenberger* mold by suggesting that his ad simply addressed a subject that was permissible—whether to buy Coors beer—from a particular perspective. The court of appeals, however, correctly rejected this argument as "plainly specious." Pet. App. 16a n.4. "The 'subject matter' of the Display," the court explained, "can hardly be described, with any remote sense of accuracy, as the merits or demerits of Coors Beer. As Lebron himself stated in an affidavit, 'I do not seek to sell anything other than ideas with this advertisement.'" *Id.*

Had Amtrak permitted the expression of different views on the political subjects addressed in petitioner's advertorial, then the exclusion of petitioner's ad might amount to viewpoint discrimination. Or if Amtrak had allowed an ad urging the audience to buy Coors beer because of the Coors family's support for "The Far Right's political agenda," Pet. App. 5a, it might be required to permit an ad that urged people not to buy Coors for the same reason. But there is no viewpoint discrimination when Amtrak has never permitted political advertising of any kind on the Spectacular.

C. There is no conflict over whether a policy against political advertising is unconstitutionally vague

Petitioner contends that, notwithstanding this Court's decision in *Lehman*, Amtrak's policy of prohibiting political advertising on the Spectacular is unconstitutionally vague. But surely petitioner has no doubt that his ad falls outside the bounds of what Amtrak's policy permits. Amtrak has only allowed commercial advertising on the Spectacular, and petitioner has recognized that his advertorial "wasn't commercial in the way they are used to." C.A.App. 228. Amtrak does not permit "political" advertising on the Spectacular, and petitioner, a self-proclaimed "*political artist*," himself describes his advertorial as a "*political statement*." C.A.App. 8 (emphasis added). Thus, the very term that petitioner deems "vague" is one that he himself has used to distinguish his work from other types of advertising.

Petitioner interprets *Hynes v. Mayor of Oradell*, 425 U.S. 610 (1976), to hold the term "political . . . cause" unconstitutionally vague. Pet. 21-23. But the Court held no such thing. The ordinance at issue in *Hynes* required persons soliciting "for a Federal, State, County or Municipal political campaign or cause" to notify the local police department in writing of their proposed activities. 425 U.S. at 613. Those who failed to follow this procedure were subject to a criminal sanction. *Id.* at 615. This Court found that while "it is fairly clear what the phrase 'political campaign' comprehends . . . it is not clear what is meant by a 'Federal, State, County or Municipal . . . Cause.'" *Id.* at 621 (second set of ellipses

in original). The Court found only this latter phrase vague—not the term "political."[10]

The decision of this Court that is on point is *Lehman*, which upheld a ban on political advertising without any reservation that the term "political" might be unconstitutionally vague. Petitioner argues that "*Lehman* did not even address a vagueness claim." Pet. 23. But Justice Brennan argued strongly in dissent in *Lehman* that "[t]he line between ideological and nonideological speech is impossible to draw with accuracy"—that it is not "possible to draw a manageable line" of the kind drawn by a policy prohibiting political advertising. 418 U.S. at 319, 320. Those arguments were unpersuasive to the majority.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

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[10] Nor is petitioner's argument supported by this Court's decision in *City of v. Plain Dealer Pub. Co.*, 486 U.S. 750 (1988). Pet. 22-23. The challenged ordinance in that case contained no standard whatsoever to guide the mayor in deciding whether to grant permission to place newsracks on public property. The mayor could deny permission for *any* reason. Amtrak's policy bears no resemblance to that ordinance.

Respectfully submitted

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